

9.08.00.00 - POSSESSION PRIOR TO JUDGMENT

9.08.01.00 Order for Possession

The Department should not obtain an Order for Possession until physical possession of the property is needed for construction or related purposes. An OP may be applied for *ex parte* (concurrently) with the suit papers or later. The Court issues the OP if it determines the Department is entitled to acquire the property by eminent domain and has deposited the probable compensation. An OP is supported by depositing probable compensation in the Condemnation Deposit Fund of the State Treasury.

Only one deposit is made on a parcel, regardless of the number and kinds of interests in the parcel. No deposit is made for fictitious defendants or any separate interest. The need for the OP and variations in amount requested from the approved appraisal must be explained.

A completed Request for Transfer of Funds (Form RW 9-19) is sent to District P&M in sufficient time to allow for verification of funding availability and encumbrance of the required amount prior to application to the court for an OP. See Condemnation Flowchart Item 10. P&M transmits Form RW 9-19 to R/W Accounting to request issuance of CA-13, Notice of Transfer of Funds.

9.08.02.00 Issuance of Order for Possession

Based on information supplied by the District, the Regional Legal Office prepares a Notice of Deposit and Summary of the Basis for the Appraisal for signature by the Appraiser. The District inserts the date of the deposit of funds in the Notice using the CA-13 date. The Notice and Summary must accompany the Application and Order for Possession (also prepared by the Legal Office) when the District submits them to the Court. Actual appearance in court may be required in some jurisdictions.

The District requests a Superior Court judge to sign the OP submitting the CA-13, Notice, and the Application. The original OP is filed with the County Clerk, together with the Notice and the Application. The Court may ask to see the CA-13 when the OP is signed, or it may require the CA-13 to be filed with other documents in the County Clerk's case file. When the documents are filed, sufficient copies must be conformed and sent to the Regional Legal Office for service.

9.08.03.00 Service of Notice of Deposit and Summary of the Basis for the Appraisal

The District makes initial service of the Notice if the OP is to be served at the same time as the Summons and Complaint. CCP Section 1255.020 requires such service to be made in the same manner as provided in CCP Section 1255.450 for service of OPs. The Regional Legal Office serves the Notice as defendants answer the Summons and Complaint. This fulfills technical service requirements set forth in CCP Section 1255.020.

Occasionally it is necessary to serve the OP after service of the Summons and Complaint. Then either the District or the Regional Legal Office serves the Notice in accordance with CCP Section 1255.450. This must be a joint determination to ensure an orderly process of service.

A court award draws interest from the date possession is to be taken, as specified in the Order. If any portion of the deposit is withdrawn prior to judgment, that portion does not draw interest.

9.08.04.00 Increase or Decrease in Amount of Deposit

The Department, or any other party having an interest in the property, may move to have the Court redetermine and order the appropriate deposit. Or, the Court on its own motion can order the deposit increased (CCP Section 1255.030). The District notifies the Regional Legal Office immediately when redetermination of the deposit is sought by the District, other party, or the Court.

If the deposit is to be decreased pursuant to CCP 1255.030 (a) and (e), the Regional Legal Office prepares a Notice of Motion for Order to Decrease Deposit and to Release Balance of Deposit to Plaintiff. The District serves the Notice of Motion on all parties along with the Declaration in Support of Motion for Order to Decrease Deposit and to Release Balance of Deposit to Plaintiff. Decrease below the amount already withdrawn is prohibited by statute. The State's attorney prepares the Motion and Order. After the Order is signed by the Court and filed, the District serves the Order on all parties.

9.08.05.00 Deposit Initiated by Defendant

When the property to be acquired is a dwelling of not more than two units and at least one is occupied as a residence by a defendant owner, or the property is subject to a leasehold interest, the resident or the lessor may initiate a deposit. The resident or lessor serves a notice on the Department requiring the Department to deposit the probable compensation at a specified date and not earlier than 30 days after service of said notice. CCP Sections 1255.040 and 1255.050 provide certain sanctions against the Department if such deposits are not made. The District should contact the Regional Legal Office if it receives such a notice.

The Regional Legal Office will probably receive the notice and will forward the notice and request for deposit to the District to arrange for the deposit.

The Department may obtain an OP, if it chooses, 30 days after making a deposit under this section. The District should inform the Regional Legal Office whether possession is desired.

9.08.06.00 Conformed Copies of Order for Possession

Before being served on a defendant, each copy of the OP must be conformed to agree with the original as filed.

9.08.07.00 Preparation of Excess Land Inventory Record

The Condemnation Section, at the time of filing the OP, notifies the acquisition agent whenever excess lands are included in an OP. The acquisition agent must prepare an Excess Land Inventory and Disposal Record inventory card and forward it to the Excess Land Section.

9.08.08.00 Service of Order for Possession

The District is required to serve a copy of the OP on all record owners of the property and on all occupants, if any. A record owner is defined as the owner of the legal or equitable title to the fee or lesser interest in property as shown by recorded deeds or other recorded instruments.

Service of the OP shall be made by personal service except as follows:

- If the person on whom service is to be made has previously appeared in the proceeding or been

served with Summons in the proceeding, service of the OP may be made by mail upon such person and their attorney of record, if any.

- If the person on whom service is to be made resides out of the State, has departed from the State or cannot with due diligence be found within the State, service may be made by registered or certified mail addressed to such person's last known address.
- The Court, for good cause shown on *ex parte* application, may authorize the plaintiff to take possession of the property without serving a copy of the OP on a record owner not occupying the property. In such cases the District should immediately request the Regional Legal Office to obtain a Court order allowing the Department to dispense with service of the OP.
- A single service on or mailing to one of several persons having a common business or residence address is sufficient. For instance, service on husband or wife is sufficient for a family unit.

9.08.08.01 Time Requirements

If the property is lawfully occupied by a person dwelling thereon or improved as a farm or business operation, service of the OP and the 90-Day Notice (issued by the Relocation Assistance Section) may be made concurrently. When there is concurrent service, the effective dates of both documents must coincide. The Relocation Assistance Branch will serve a 30-Day Notice to Vacate at the end of the first 60 days of the Informational Notice. Close coordination is required between Relocation and Acquisition to have the effective dates coincide.

In all other cases, service shall be made not less than 30 days prior to the time possession is to be taken. If uncertain, always give 90 days' notice. Service of the OP may be made at the same time as or following service of Summons.

9.08.08.02 Circumstances

Service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the Order under the following circumstances:

1. The Department has deposited probable compensation pursuant to a deposit initiated by an owner (CCP 1255.040 and 1255.050) **or**
2. The Department has deposited the probable compensation and the defendant in possession has either:
 - Expressed in writing a willingness to surrender possession of the property on or after a stated date, **or**
 - Withdrawn any portion of the deposit.

If the District seeks possession on either of the two conditions in 2. above, CCP Section 1255.460 requires that the OP:

- Recite that the OP is made pursuant to CCP Section 1255.460.
- Describe the property to be acquired. The description may be by reference to the Complaint.
- Include the date after which the Department is authorized to take possession. This can be the date requested by the defendant, or, if a portion of the deposit is withdrawn, not less than 30 days after the date the deposit was made.

9.08.09.00 Order for Possession - Emergency Situations - No Appraisal

Emergency projects are those that preserve health, safety, welfare, or property. In emergency situations where there is insufficient time to complete an appraisal of a required property prior to the date possession is needed, Regions/Districts have the authority to approve use of an estimated compensation. The appraiser executes an affidavit stating:

- The reasons why possession must be obtained immediately.
- That an adequate appraisal cannot be made in time.

- The status and estimated date of availability of the appraisal.
- A good faith estimate of the probable amount of compensation.

CCP Section 1245.230 requires an appraisal and offer thereof be made within 90 days of the adoption of a Resolution of Necessity. The Regional Legal Office prepares a motion requesting the Court to accept the estimated compensation as the deposit. The motion accompanies the Notice of Transfer of Funds, the OP, and the affidavit. The Court issuance of the OP requires compliance with the affidavit, which must be as accurate as possible.

9.08.10.00 Order for Possession - 3-Day Notice

The Court may make an OP to be effective in not less than three days and as it deems appropriate under the circumstances of the case if a deposit of probable compensation has been made and the Court finds:

- The Department has an urgent need for possession, and
- Possession will not displace or unreasonably affect any person in actual and lawful possession.

When asking the Regional Legal Office for a 3-day OP, the District shall state the justification. The Regional Legal Office prepares the Application and the OP and sends them to the District. The designated Right of Way Agent shall execute the Declaration and follow procedures for filing the OP.

9.08.11.00 Declaration of Service of Order for Possession

Where service of the copy of the OP is by regular or certified mail, a Declaration of Mailing (Form RW 9-14) shall immediately be executed and transmitted to the Regional Legal Office.

Where a copy of the OP is personally served, the District sends the Proof of Service to the Regional Legal Office. The Declaration should state that the

person served is a record owner or a person in possession.

9.08.12.00 Notice of Tax Cancellation

Upon securing possession under OP, the District must notify the appropriate local taxing authorities of the action taken. (See Acquisition Section 8.66.04.00 for variations in notice requirements.)

9.08.13.00 Stay of Order for Possession Because of Hardship

Within 30 days of service of an OP, a defendant or occupant may request the Court to stay its Order and set a new possession date or impose terms and conditions on the property's use. The Court may do this upon a dual finding of fact, e.g., substantial hardship on the defendant or occupant versus the Department's need in seeking early possession. The Court may make an Order appropriate to the circumstances.

A defendant may make a motion to stay the Order, in which case the Regional Legal Office coordinates with the District to present evidence in support of obtaining the OP.

Where a person occupying property refuses to move by the possession date indicated in the OP,

possession can be obtained through a Writ of Assistance. The District notifies the Regional Legal Office to initiate this process as necessary.

9.08.14.00 Disposing of Building Improvements on Property Under Order for Possession

The right to use the land under OP includes the right to dispose of improvements. The Property Management chapter includes instructions covering the issuance of Bills of Sale for such improvements. Right of Way Improvements and Personal Property Inventory and Disposal Record must be prepared at the time of obtaining possession. If there is a dispute as to whether an item is an improvement, the court can be asked to make a determination. (See CCP 1260.030.)

9.08.15.00 Owner Abandons Personal Property

If an owner refuses to remove personal property or abandons it, the District shall refer the problem to the Regional Legal Office. It may be necessary to arrange through a law enforcement agency for removal and storage of the personal property in a public warehouse for the account of the owner.